PUBLIC PROSECUTOR

v.

HAJI HUSSIN BIN HAJI MOHD REJAB

HIGH COURT, KUALA LUMPUR
DATUK WIRA WAN YAHYA BIN PAWAN TEH J.
[CRIMINAL APPEAL NO 52-5-88]
28 FEBRUARY 1992

CRIMINAL LAW: Charge under s. 409 of the Penal Code - Appeal against acquittal and discharge by lower Court - Whether the prerequisities of the offence of criminal breach of trust namely, entrustment and dishonest intention, had been satisfactorily made out.

The respondent, the Chairman of a company, was charged under s. 409 of the Penal Code in the Sessions Court. At the end of the prosecutions case the learned Sessions Court Judge, after holding that the prerequisities of entrustment and dishonest intention had not been satisfactorily made out, acquitted and discharged the respondent.

The prosecution appealed, contending that the learned Sessions Court Judge's finding was wrong as evidence of entrustment could be found in the evidence of several witnesses.

Held:

[1] Unless the contrary is shown, the proper authority having control over a company's assets, including cash, is the Board of Directors and not any one Director in his individual capacity. A Manager of a firm cannot be liable for breach of trust where there is no personal entrustment to him.

[2] While the Court was satisfied that there was some degree of interference or influence exercised by the respondent over his staff, the evidence did not necessarily imply the element of entrustment. Based on the evidence adduced it was difficult to come to a definite conclusion as to who was actually in charge of the financial aspect of the company.

[3] Looking at the recorded evidence on dishonest intention, it would appear that no conclusive finding can be drawn from the witnesses and in the circumstances it was quite proper for the learned Sessions Court Judge to find, as he did, that the money advanced to the respondent was in the nature of a loan.

[4] The learned Sessions Court Judge had arrived at the conclusion that the respondent was not acting dishonestly after hearing the evidence of several prosecution witnesses. This was an inference drawn from findings of fact and there was insufficient reason to interfere with the learned Sessions Court Judge's conclusion.

[Appeal dismissed. Sessions Court's decision acquitting and discharging respondent upheld].

Cases referred to:

Guha SC 1930 32 Coi L J 149 ***(refd)***
Lincolnshire Sugar Co. Ltd v. Smart [1937] AC 697 ***(refd)***
Bronester Ltd v. Priddle [1961] 3 All ER 471 ***(refd)***
Satyabrata Bhaltachariya 1976 Cr. L J 446 ***(refd)***

Legislation referred to:

Penal Code, ss. 405, 409

For the appellant - Abu Bakar Jais (Mohd. Zulkarnain with him) DPP; Badan Pencegah Rasuah
For the respondent - Muhd. bin Burok; M/s Abu Zahar Azmel & Partners

JUDGMENT

Wan Yahya Bin Pawan Teh J:

The respondent, a Chairman of Pasaraya Baitulmal Sendirian Berhad was charged under s. 409 of the Penal Code. In the prosecution case it was alleged that he had caused payments for RM10,000 to be made to him as an 'advance' for his trip to London in relation to the business of another related Company - Baitulmal Wilayah Sendirian Berhad.

At the end of the prosecution's case the learned Sessions Court Judge, after holding that the prerequisities of entrustment and dishonest intention had not been satisfactorily made out, acquitted and discharged the respondent.

It is the view of the learned Sessions Court Judge that the respondent, as an Executive Chairman, was entrusted with the power to manage the administrative operation of the Company only and is in turn fully responsible to the Board of Directors. The Sessions Court Judge also found that the financial aspect of the Company was not within the respondent's domain and that there was no proper control and poorly maintained accounts of the Company.

Before the Court it was contended that the learned Sessions Court Judge's finding was

wrong as evidence of entrustment can be found in the evidence of several witnesses.

On this point I was referred to the evidence of PW2 where it was said the respondent was one of the signatories of any cheque to be issued and that the respondent could authorise payment. It was also pointed out to me the evidence of PW3 that the respondent was aware of the financial dealing and system of the Company and that money taken was not in connection with the Company's activities. My attention was likewise drawn to the fact that the respondent had already been granted allocation for a similar purpose by Baitulmal Wilayah Sendirian Berhad.

I have gone through the evidence of all these witnesses referred to by the appellant and although I am satisfied that there was some degree of interference or perhaps influence exercised by the respondent over his staff the evidence does not necessarily imply the element of entrustment, after all the Company had an assistant director, PW4, who gave evidence that in that capacity he was responsible for the certification of vouchers for all payments. Then there were others who could have signed together with the respondent or any two of the designated persons to authorise payments. Like the Sessions Court Judge, I found it difficult to come to a definite conclusion as to who was actually in charge of the financial aspect of the Company. Unless the contrary is shown the proper authority having control of the Company's assets, including cash, is the Board of Directors and not any one Director in his individual capacity. A Manager of a firm cannot be liable for breach of trust where there is no personal entrustment of the money to him but to the firm - *Guha* S.C. 1930 32 Coi L.J. 149.

I now turn to the next issue on dishonest intention. To prove s. 409, the prosecution must not only prove entrustment but it must also show that the respondent had committed breach of trust in respect of the property so entrusted. Criminal Breach of Trust as defined under s. 405 requires the prosecution to prove dishonest misappropriation, conversion or disposal of property.

The learned Sessions Court Judge found that the money was requested by the respondent as an advance or a loan and that he had done so openly and in keeping with the normal procedure. As against this, the prosecution argued that there was no such provision for a loan. I have looked at recorded evidence on this issue and it would appear that no conclusive finding can be drawn from the witnesses. Some of whom seem to think that he could not, others were not sure snd PW6 seems to think that the respondent could do so as Pasaraya Baitulmal Sendirian Berhad is related to Baituimal Wilayah Persekutuan. The documentary evidence was of no assistance.

In such circumstances it was proper for the learned Sessions Court Judge to find, as he did, that the money was in the nature of a loan.

The question that may be asked is whether an advance is a loan. In *Lincolnshire Sugar Co. Ltd v. Smart* [1937] AC 697, Lord Macmillan said:

> I agree that the word "advance" is ambiguous and may either refer to prepayments of what will become due in future or be a polite euphemism for loans.

Again in *Bronester Ltd v. Priddle* [1961] 3 All ER 471 Lord Justice Holroyd Pearce held that:

> When someone says: "I am going to make you an advance", I think they are saying: "We will let you have it as a loan or on an implied understanding that if the event does not occur which makes it legally payable, we must have it back.

A loan creates a debt and failure to pay a debt is not Criminal Breach of Trust. *Satyabrata Bhaltachariya* 1976 Cr. L.J. 446.

I am aware that the respondent had used his official position to cause the money to be paid to him and there is a possibility of an offence under the Emergency Essential Powers Ordinance having been committed but the mere conduct of the respondent in influencing his officers into making the payment of an 'advance' to him is not necessarily a criminal breach of trust.

The learnad Sessions Court Judge had arrived at the conclusion that the respondent was not acting dishonestly after hearing the evidence of several prosecution witnesses. It is an inference drawn from findings of fact to which I find insufficient reason to interfer with.

Accordingly I would uphold his decision and dismiss the appeal.